Supreme Court, U. S.
FILED
JUL 26 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-109

NICHOLAS B. STEPHENS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

LIONEL R. BARRETT, JR.
Barrett, Brandt & Barrett, P.C.
9th Floor
Third National Bank Bldg.
Nashville, Tennessee 37219

Counsel for Petitioner

Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO. • (202) 393-0625

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	2
QUESTION PRESENTED	2
STATUTE INVOLVED	2
STATEMENT	3
I. Summary of Proceedings	3
II. Summary of Facts	4
REASON FOR GRANTING THE WRIT	10
CONCLUSION	13
CERTIFICATE OF SERVICE	13

TABLE OF AUTHORITIES

Cases:

Alderman v. United States, 394 U.S. 165, 89 S. Ct. 961, 22 L.Ed.2d 176 (1968) 11,12

Brown v. United States, 411 U.S. 223, 93 S. Ct. 1565, 36 L.Ed.2d 208 (1973) 10,11

United States v. Hearn, 496 F.2d 236 at 241. 10,11

United States v. Jones, 362 U.S. at 261, 80 S. Ct. 25 731, 4 L.Ed.2d at 702 11

Statutes:

21 U.S.C. § 841(a)(1) 2

28 U.S.C. 1254(1) 2

Rules:

Federal Rules of Criminal Procedure, Rule 41 11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No.

NICHOLAS B. STEPHENS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

The petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit which was entered in the above case on April 22, 1976 as reiterated by the Order of the Court denying the petition for re-hearing issued on June 8, 1976.

OPINIONS BELOW

The orders of the United States Court of Appeals for the Sixth Circuit that the petitioner feels he is aggrieved by are unreported. They are attached to this Petition for Certiorari.

JURISDICTION

As stated earlier, the judgment of the Sixth Circuit Court of Appeals was initially made on April 22, 1976 and a petition for re-hearing was denied on June 8, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTION PRESENTED

The sole question presented by the petitioner in this application for writ of certiorari is whether or not the Sixth Circuit erred in ruling that the petitioner did not having standing to contest the search and seizure of the controlled substance that was involved in this case.

STATUTES INVOLVED

The statute involved is 21 U.S.C. § 841(a)(1). This statute charged the defendant with intentionally and unlawfully possessing with the intent to distribute a controlled substance, to wit: a quantity of marijuana, a Schedule I controlled substance.

STATEMENT

I.

Summary of Proceedings

After the defendant's arrest on Christmas Eve of 1974, for unlawfully possessing with the intent to distribute or dispense, a controlled substance, to wit: marijuana, the defendant, NICHOLAS B. STEPHENS was indicted on January 23, 1975 in the United States District Court for the Middle District of Tennessee. That indictment was a two-count indictment alleging not only the possession with intent to distribute marijuana, but also possession with intent to distribute phencyclidine hydrobromide, a schedule III controlled substance. On February 18, 1976, the defendant STEPHENS filed a Motion to Suppress and a evidentiary hearing was held on this Motion on March 6, 1975. It is this Motion to Suppress that constitutes the primary basis for the appeal of the defendant STEPHENS. On April 29, 1975, the Honorable Frank Gray, Jr., Judge for the Middle District of Tennessee entered an Order denying this Motion to Suppress.

Thereafter, on August 7 and 8, 1975, trial was held in this matter and both defendants were convicted of Count One of the two-count indictment. The defendant STEPHENS was found not-guilty of the second count of the indictment. The defendant NICHOLAS STEPHENS duly perfected his appeal to the Sixth Circuit Court of Appeals in Cincinnati. That Court, in essense, ruled that the defendant – petitioner herein – did not have standing to contest the searches involved in this matter. The Petition for Re-Hearing was duly

filed and the Sixth Circuit Court of Appeals denied an application for re-hearing on June 8, 1976.

II.

Summary of Facts

On December 21, 1974, agent John B. Dobson of the San Diego Police Department was contacted by American Airlines officials that two suspicious foot-lockers, possibly containing marijuana, were at the American Airlines freight section of the San Diego International Airport. (A-5).

The agent was contacted at 5:30 A.M. that the two trunks were on trams at the freight building. (A-10). At that time he and his assistant, Agent William Flores, also of the San Diego Police Department, arrived at the Air Freight office at 6:10 A.M. The agents were informed that this particular flight would be departing for Nashville, Tennessee, at approximately 7:40 A.M. Agent Dobson testified that as a matter of routine, he did attempt to obtain search warrants in situations of this nature. (A-6).

Due to the odor of marijuana, the agents decided to open the trunks at 6:30 A.M. (A-7). After detecting what they thought was the ordor of marijuana, the agents took the trunks off the tram and immediately opened them. The agents indicated that roughly three minutes elapsed from the initial smell of the purported marijuana until the efforts began to force open the locked trunks. The forcible entry was made by means of a screw-driver, punch and hammer. (A-12, 13). Eighty-nine (89) kils packages were found in the two trunks. (A-28, A-64).

The agents apparently attempted to get the trunks back on the original flight to Nashville, but were unable to do this and the trunks left on a substantially later flight. (A-43). The San Diego Agents who both were also Deputy United States Marshalls (A-20), indicated that their only basis for seizing the trunks at this time was the odor of marijuana, possibly mingled with the odor of talc from one of the packages. (A-11). Agent Dobson of the airport detail, did testify that he had detected odors that he had thought that were marijuana but turned out to be something that was only similar. (A-11).

No effort was made to secure a search warrant at any time by any officer involved. As Officer Bodson testified to, "In my own mind, I felt I had enough probable cause to open these trunks." (A-15). Agent Flores testified similarly that, "Under the circumstances, I felt we didn't need a search warrant." (A-41). Agent Flores earlier testified that the question of the search warrant, "didn't come to my mind." (A-40). It was admitted upon questioning by the Honorable Judge Gray that no attempt was made to contact anyone pertaining to a search warrant. (A-32, 33).

Upon questioning by the attorneys for the defendants, and the Court, the San Diego agents indicated that since this was a Saturday, that it would be difficult to possibly obtain a search warrant. The testimony indicated that from the location of the trunks with the controlled substance, that it was approximately one and one-half miles to either a San Diego Courthouse or to a United States magistrate, and that it would take approximately five to ten minutes to drive into these judicial headquarters. (A-18, 21, 22, 48). The facts indicated that the standard procedure to obtain a search

warrant in San Diego County, was to call the Sheriff's business office, who in turn would refer the agent to a Deputy District Attorney, who at that time, would attempt to locate a Judge to attempt to execute a telephonic search warrant. (A-8). Agent Dobson indicated that it might have taken two and one-half to three hours to have obtained a search warrant. (A-7). The agents further testified that the standard policy of law enforcement personnel was to go only through certain set channels. That being either through the Sheriff's office or through the office of the United States Attorney. It was indicated that attempting to contact a Judge of magistrate in person was frowned upon, and that, "it isn't done that way in San Diego County." (A-46). Agent Flores indicated that while a few agents that he was personally aware of, had gone directly to a Judge's home to obtain a search warrant, that, "they have been told to follow the proper procedures." (A-47). Agent Flores went on to add, however, once again, that no effort was made to contact any magistrate or Judge of any kind, either State or federal, to obtain a search warrant, since, in his opinion, "we didn't think we needed a search warrant." (A-50).

It was indicated that certain forms which facilitated the obtaining of a search warrant were only seven to eight minutes away from the airport. (A-52).

Testimony further indicated that although the American Airlines officials had been extremely cooperative in this matter, and had removed the trunks out of the normal system of freight, that the American Airline officials were never asked if it would be possible to detain these trunks for the purpose of getting a search warrant, assuming that American Airlines had the final

discretion in this matter. (A-15, A-41, A-52). Agent Dobson did testify, however, that if he had gone to get a search warrant that he would have considered the trunks seized by his partner, Agent Flores. (A-30).

At this time, the trunks, minus one kilo of marijuana, were allowed to proceed to their apparent destination in the Middle District of Tennessee.

EVENTS SUBSEQUENT TO TRUNKS ARRIVAL IN MIDDLE DISTRICT OF TENNESSEE

The trunks in question, no longer in the physical custody of the San Diego agents, apparently arrived in Nashville, on or about the 22nd of December, 1974. At this time, Agent Francisco Guzman of the D.E.A. office in Nashville, was notified of their arrival. (A-66). Agent Guzman had previously determined, partially upon the advice of an Assistant United States Attorney for the Middle District of Tennessee, that it would not be necessary to make any effort to obtain a search warrant for the trunks upon their arrival in Nashville. (A-77). The trunks were left at the Metropolitan Nashville Airport, except for certain times when they were loaded into a government van and moved back to the D.E.A. office rather than remaining at the airport. (A-67). On December 24, 1974, a female caller left word with the freight agency in Nashville that someone would soon pick up these packages (A-82), and the co-defendant in this matter, Ernest Brackeen, physically signed for the packages that were under surveillance on the evening of December 24, 1974. (A-73).

The defendant Brackeen was placed under arrest at that time and he and the packages were transported

back to the D.E.A. office in downtown Nashville. From this time forward, the defendant Brackeen was acting pursuant to the directions of the Drug Enforcement Administration officers in Nashville. (A-95). The contents of the trunks were secured by the D.E.A. officials with the exception of one kilo package left in each of the two trunks. (A-86).

The co-defendant Brackeen, at this time, accompanied by local officers, drove to Hendersonville, Tennessee at approximately 8:20 P.M. At this time, the testimony indicates that another subject, identified by one officer as being NICHOLAS STEPHENS, came out to apparently discuss something with Brackeen.

Detective Sergeant David Key of the Hendersonville Police Department indicated that while both subjects were in the vicinity of the trunks in question that he could not detect any movement of the trunks. His notes reflected that the co-defendant Brackeen yelled something to the effect of, "Run", to an unidentified female near the activity. Officer Key indicated that he felt his original notes were in error and that it might have been the defendant NICHOLAS STEPHENS. Officer Key indicated that he did not see the trunks moved by the subjects. (A-97 – A-111).

Officer Donald Cochran, who was in the car with Officer Key, indicated that the co-defendant Brackeen had generally stated, "that the marijuana was not all his, that he didn't feel like he should take the whole rap for the marijuana." (A-117).

Officer Cochran further testified that the defendant STEPHENS walked over and placed his hands on the trunk at which time he was placed under arrest and that STEPHENS, at that time, yelled something to the effect, "Run", to the unidentified female subject.

Officer Cochran further testified that on one occasion he saw STEPHENS grab one of the trunks with both hands and start to shake it. (A-119 – A-127).

There was no evidence of any statement being made by the defendant STEPHENS contrary to his self-interest, or any statement made by the defendant Brackeen to the detriment of the defendant STEPHENS.

The government called for its toxicology proof, Mr. Wilmer Kiser, a forensic chemist for the Drug Enforcement Administration. There was no dispute as to his qualifications and he testified that of the representative samples from the eighty-seven (87) kilo bags that he observed, only twenty were analyzed. There was no evidence that one of the twenty that was analyzed by Mr. Kiser was in the trunks that arrived in Hendersonville, Tennessee where the defendant STEPHENS allegedly resided. (A-131).

As its concluding witness, the government called a Mr. James Leon Parker, Jr., who testified that he had previously dealt in narcotics with both defendants, Brackeen and STEPHENS, and that he had brought suitcases of marijuana to Nashville for the defendant STEPHENS and had seen similar trunks in the apartment resided in by the defendant STEPHENS. This witness indicated that he had initially made these unlawful activities of his own known to military authorities in order that he could get out of the Marine Corps. (A-133 - A-156).

REASON FOR GRANTING THE WRIT

The petitioner contends that the Court of Appeals misapprehended the ruling in *United States v. Hearn*, 496 F.2d 236 at 241, as it applies to the facts in this case.

A. The decision in United States v. Hearn, supra, does not require that the instant case be dismissed for lack of standing.

The Court of Appeals cited the case of *United States v. Hearn*, 496 F.2d 236 at 241 (6th Cir. 1974), as authority for their ruling that the defendant NICHOLAS STEPHENS did not have standing to contest the search. The rule is apparently stated by referring with approval to *Brown v. United States*, 411 U.S. 223, 93 S. Ct. 1565, 36 L.Ed.2d 208 (1973). In that decision, the Court stated:

> "[T]here is not standing to contest a search and seizure where as here, the defendants: (a) were not on the premises at the time of the contested search and seizure; (b) had no propriatary or possessory interest in the premises; and (c) were not charged with an offense that includes, as an essential element of the offense charged, possession of the seized evidence at the time of the contested search and seizure . . .". 411 U.S. at 299, 93 S. Ct. at 1569, 36 L.Ed.2d at 214.

Assuming that the quoted language is a correct statement of the rule, it does not lead to a lack of standing in the instant case. The record in this case shows that the United States attorney offered proof through the testimony of one James Parker that the defendant NICHOLAS STEPHENS, was directly

responsible for previously having trunks containing marijuana at the San Diego airport for shipment to Nashville, Tennessee. (GOVT. APPENDIX A-23 - A-3U). Had the government not introduced this testimony, then the rules as announced in *Hearn, supra,* and *Brown, supra,* might preclude standing on the part of this defendant. It seems manifestly unfair, however, for the government to argue that the defendant is responsible and is the actual owner of the trunks in question for the purposes of convincing a jury; but then to ask that this testimony be disregarded on appeal so as to deny standing to the defendant to contest the very search at issue.

To challenge the admissability of evidence because of a Fourth Amendment violation, an individual must be a "person aggrieved." F.R.CRIM.P. 41 (e). A "person aggrieved" is one who is "a victim of a search or seizure, one against whom the search was directed, as distinguished from one who claims prejudice only through the use of evidence gathered at the consequence of a search or seizure directed at someone else." See *Jones, supra,* 362 U.S. at 261, 80 S. Ct. at 731, 4 L.Ed. 2d at 702.

The *Hearn* decision can be distinguished since in that case the Appellants were attempting to object to a search of their co-defendant's premises, and the evidence obtained as the result of the search was properly admitted as to them. In the present case, the defendant, NICHOLAS STEPHENS, is a person, as the evidence indicates, as to whom the search was actually directed. The *Hearn* decision indicates that the current status of the law as to standing on a search question is largely governed by the case of *Alderman v. United States*, 394 U.S. 165, 89 S. Ct. 961, 22 L.Ed.2d 176

(1968). *Alderman* indicates that Fourth Amendment Rights are personal rights, which, like some other constitutional right, may not be vicariously asserted. The defendant STEPHENS does not quarrel with this proposition of law, but would point out that he was not asserting the right of another party or defendant, but rather for himself. The government introduced evidence that Mr. STEPHENS was responsible for the items being in San Diego and that he was directly responsible for their presence.

Possibly, it was for this reason that the government, at the trial level, did not object to the standing of the defendant STEPHENS to contest the search. The government realized that it obviously would be inconsistent for them to introduce proof that Mr. STEPHENS was responsible for the items being in the San Diego airport where they were searched, but yet to argue at the trial level that he would not have standing to object to his trunks being searched when they arrived in Nashville. The defendant strongly contends that the government has offered testimony that stood unrefuted that Mr. Stephens was in all likelihood responsible for the trunks being in San Diego and based upon the testimony introduced by government witnesses, that they themselves have conferred standing upon Mr. Stephens to contest the search in San Diego.

CONCLUSION

For the reasons above, the petitioner contends that the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

BARRETT, BRANDT & BARRETT,

BY: LIONEL R. BARRETT, JR.
LIONEL R. BARRETT, Jr.
9th Floor, 3rd Nat'l Bank Bldg.
Nashville, Tennessee 37219
615/244-2202

Counsel for Petitioner

CERTIFICATE OF SERVICE

I, Lionel R. Barrett, Jr., Attorney for the Petitioner, Nicholas B. Stephens, hereby certifies that on the 23rd day of July, 1976, I served a copy of the foregoing Petition for Writ of Certiorari to the Solicitor General of the United States, United States Department of Justice, Washington, D.C., 20530, by mailing a copy of same in a duly addressed envelope, postage prepaid.

LIONEL R. BARRETT, JR.

Appendix A

No. 75-2207

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,	)	
Plaintiff-Appellee,	)	
v.	)	ORDER
NICHOLAS B. STEPHENS,	)	
Defendant-Appellant.	)	

Before: CELEBREZZE, PECK and ENGEL, Circuit Judges.

Appellant having filed a petition for rehearing with this Court, and this Court having considered said petition and being duly advised in the premises,

It is ORDERED that the petition for rehearing be, and it is hereby denied.

ENTERED BY ORDER OF THE COURT

/s/ JOHN P. HEHMAN
JOHN P. HEHMAN, CLERK

No. 75-2207
75-2208

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,)

Plaintiff-Appellee,)

v.)

NICHOLAS B. STEPHENS,)

Defendant-Appellant,) ORDER

----------)

UNITED STATES OF AMERICA,)

Plaintiff-Appellee,)

v.)

ERNEST BRACKEEN,)

Defendant-Appellant.)

Before: CELEBREZZE, PECK and ENGEL, Circuit Judges.

Appellants were convicted in the District Court for the Middle District of Tennessee by a jury of possessing marihuana with the intent to distribute, in violation of 21 U.S.C. §841(a)(1). Appellants raise a number of issues in their briefs and argument to the Court.

Appellants' primary contention is that marihuana was discovered by virtue of an unreasonable warrantless search at the San Diego International Airport. Neither Appellant was in San Diego at the time of the search and the marihuana was contained in two foot lockers addressed to a person other than either Appellant. Appellants lack standing to challenge this search. *United States v. Hearn*, 496 F.2d 236, 241 (6th Cir. 1974).

A review of the record, briefs, and arguments indicates that Appellants' remaining contentions are without merit.

It is therefore ORDERED that the judgment of the District Court be, and it hereby is, affirmed.

ENTERED BY ORDER OF THE COURT

/s/ JOHN P. HEHMAN
JOHN P. HEHMAN, CLERK